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Supreme Court of the United States

October Term 1978

No. 78-1376

DRESSER INDUSTRIES, INC.,
Petitioner,

v.

COMMUNITY TELEVISION SERVICES, INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Petitioner, Dresser Industries, Inc., respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit or, alternatively, to vacate the judgment and remand to the Court of Appeals for further proceedings consistent with accepted judicial practice.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 586 F.2d 637 and is set forth as Appendix A. The order of the Court of Appeals denying a petition for rehearing and the dissent therefrom are set forth as Appendix B. The Memorandum Opinion of the District Court is set forth as Appendix C.

JURISDICTION

The Court of Appeals judgment of which review is sought was entered September 13, 1978. Petitioner's timely Petition For Rehearing was denied November 24, 1978. By order of this Court, Petitioner's time to file this Petition was extended to March 8, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the Court of Appeals violated basic principles of appellate procedure when it searched the record for evidence to support a legal rationale which it had conceived, but which had never been urged by Respondent at trial or in the Appeal and to which Petitioner has never had an opportunity to respond.

2. Whether Petitioner was deprived of its constitutionally protected right to have a jury decide the claim against it when the Court of Appeals relied exclusively upon evidence which could not have been considered by the jury and was expressly rejected by the Trial Court.

CONSTITUTIONAL PROVISION, RULES OF PROCEDURE AND STATUTES INVOLVED

The United States Constitution, Amendment VII, provides:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

The Court of Appeals' decision raises questions involving federal appellate practice generally and, in particular, as embodied in Rule 28 of the Federal Rules of Appellate

Procedure reproduced in Appendix D. The power of this Court to supervise the Federal courts is embodied in Supreme Court Rule 19, which is also reproduced in Appendix D.

As presented in the District Court and in the Court of Appeals, this case involved various sections of the Uniform Commercial Code as enacted in South Dakota, including:

UCC	S.D.C.L.
1-102	57-1-5
1-204	57-1-14
2-313	57-4-27
2-316(1)-(4)	57-4-34 to -39
2-317	57-4-40
2-719(1)-(4)	57-8-49 to -51
2-725(1)-(4)	57-8-61 to -64

The foregoing sections are reproduced in Appendix D.[1]

STATEMENT OF THE CASE

At its inception, this case was no more than a dispute concerning principles of commercial law. But the events which transpired in its appeal reveal a serious miscarriage of justice which deserves, if not demands, the exercise of this Court's power of supervision. The result—left untouched—will unjustifiably and seriously impact the Petitioner in this case and in a related case yet to be tried[2] and could impose a significant

---

[1] Appendix D is bound separately and contains in addition to the text of the statutes, excerpts from the record which Petitioner deems to be of crucial importance.

[2] The Court's decision arguably may seriously impact two cases brought by Respondent's television stations. These suits are for the consequential damages allegedly suffered by the stations as a result of being off the air after the tower's collapse. The aggregate claim by the stations is for $1,856,000. The cases are captioned *Midcontinent Broadcasting Co.* v. *Dresser Industries, Inc.*, (File #77-4104) and *Forum Communications Co.* v. *Dresser Industries, Inc.* (File #77-4042). Both cases are pending in the United States District Court for South Dakota, Southern Division.

burden on the business community. More importantly, the decision could establish a precedential seed which could materially alter our traditional adversary system.

Instead of limiting itself to a review of the record and to the legal issues framed by the parties, the Court of Appeals became an advocate of both the facts and the law. Stated differently, this case presents a situation where the Court of Appeals decided that—despite the fact that the record was deficient—the verdict should be sustained even though that required a strained and convoluted rationale which had no support in the record and was not briefed or otherwise argued in the appeal by either party.

In short, the quality of justice dispensed by the Court of Appeals in this case is far less than what litigants are entitled to receive and substantially below that which this Court has tolerated in the past.

The Factual Background Of This Litigation

This controversy arose after a tall (2,000 feet) television transmission tower erected by Petitioner collapsed during a severe winter blizzard in South Dakota on January 11, 1975. The tower had been purchased by Respondent, Community Television Services, Inc. in 1968 and became operational in May of 1969. During the intervening five years prior to its collapse, Respondent was exclusively responsible for its operation and maintenance. The tower had been erected as a replacement for one (also purchased from Petitioner) that had been destroyed when a guy wire was severed by a low flying plane approximately nine months after it became operational.

Prior to its purchase of the first tower, Respondent thoroughly investigated and initiated negotiations with all manufacturers of tall towers before entering into a contract with

Petitioner in July of 1966. Respondent had purchased tall towers before from other manufacturers and was no stranger to the process involved in the purchase of such sophisticated equipment.

The contract for the second tower—which is the one at issue here—was signed in 1968 without renegotiation, except as to price, and in form substantially identical to the first contract. Both towers were erected pursuant to detailed technical specifications. For purposes of this case, the crucial specification was that:

> "The tower shall be designed to resist a uniform wind load per drawing T-5172, Sheet S-1, 60 psf on flats." (A-310)

It was common knowledge in the industry that this specification meant that the tower would be designed and constructed to withstand a horizontal wind force of 120 miles per hour, absent other factors such as ice.

After the tower's collapse, Respondent filed suit in the United States District Court for South Dakota, Southern Division on the basis of diversity of citizenship. Recovery was sought against Petitioner under four counts. In the tort counts, Respondent claimed Petitioner had been negligent in the design and construction of the tower, or that Petitioner should be held strictly liable for the tower's collapse. Under its contract counts, Respondent claimed that the tower's collapse breached express and implied warranties under the Uniform Commercial Code as enacted in South Dakota.

The Trial

Respondent based its case on liability primarily on the testimony of expert witnesses. That evidence—considered most favorably to Respondent—established that the wind velocity at the height of the storm was less than 120 miles per hour and that the tower did not collapse because of a build up of

ice—which was one of Petitioner's key defenses. However, none of Respondent's experts testified nor was there *any* other evidence that the tower failed to conform to any of the contract specifications or that it was carelessly or negligently erected. In fact, all of Respondent's technical experts "unequivocally" agreed that the tower did meet the wind loading specification of "60 psf on the flats." Finally, there was no evidence of any sort that the tower collapsed because of the *force* of the wind.

As observed by the Eighth Circuit:

> "Community's experts testified that they had eliminated metallurgical or mechanical failure or abnormal wind loading as the cause of collapse. (A-3)
>
> . . .
>
> Thus, the jury did not find that Dresser's product or construction was defective in materials or workmanship or failed to meet the applicable specifications. (A-12)

The only causational evidence offered by Respondent to explain the collapse was expert opinion that the tower's failure occurred because of a phenomenon (inherent in all guyed structures) known as harmonic resonance. These experts conceded that engineering avoidance of harmonic resonance was beyond the state of the art for tall towers.[3] In severe cases, harmonic resonance can—and in this case according to Respondent's experts did—so fatigue the structure that it is literally shaken down.

In defense, Petitioner's experts sought to establish that the tower had collapsed because of a build up of ice on the tower members, which magnified the effect of the wind far beyond the 120 mile per hour wind loading specification.

Petitioner moved for a directed verdict on all counts. The District Court dismissed the implied warranty count by enforcing the disclaimer contained in the parties' contract. That provision (herein referred to as "Item 9") also contains time and damage limitations on Petitioner's warranties, which were the subject of considerable dispute at trial and in the Appeal. Item 9 states in pertinent part as follows:

[3] A finding acknowledged by the Court of Appeals. (A-4)

> "9. WARRANTY AND LIMITATION OF LIABILITY: Seller warrants, for a period of six months, that products of its own manufacture and any construction performed hereunder by the Seller shall meet the applicable specifications incorporated in this contract, and be free from defects in material and workmanship. Provided Buyer submits a claim in writing to Seller immediately upon its discovery and in any event within six (6) months after shipment if no construction is performed hereunder or within six (6) months after final acceptance by Buyer if construction work is performed (or within six months from notification of completion by Seller if Buyer wrongfully refuses or delays final acceptance), Seller shall, at Seller's sole option, repair, replace or refund an equitable portion of the purchase price of any product or work which Seller determines to have been defective or failed to meet applicable specifications. . . .
>
> Except for obligations expressly and specifically assumed under the other clauses of these Sales Terms, the foregoing is Seller's only warranty, obligation, and liability, under tort (including alleged negligence) contract or otherwise for or in connection with its products, work and services or use thereof. THE FOREGOING IS EXPRESSLY IN LIEU OF ALL OTHER WARRANTIES WHATSOEVER, EXPRESS, IMPLIED AND STATUTORY, INCLUDING WITHOUT LIMITATION, THE IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS. IT IS SPECIFICALLY UNDERSTOOD SELLER'S PRICE IS BASED UPON THE FOREGOING LIMITATION OF LIABILITY AND BUYER'S WAIVER OF ANY AND ALL CLAIMS FOR DAMAGES." (Emphasis as in original. The full text of the "Terms and Conditions of Sale" appears at A-318 and the other contract provisions at A-308.)

Despite some serious misgivings about whether Respondent had any proof to establish a breach of its express warranty claim, (A-55, 61), the District Court denied Petitioner's motion except as to the implied warranty count.

The case was given to the jury under standardized instructions regarding negligence, strict liability and breach of express warranty. (A-108) The only express warranty mentioned in the instructions was the 60 psf design specification, which the District Court found to be a warranty as a matter of law. (A-120) Consistent with this, the District Court described Respondent's claim to the jury as follows:

> "In its third cause of action, and as an alternative plaintiff alleges that defendant is liable for damages on the ground that the defendant expressly warranted to plaintiff, in the sale of the tower, that the tower would withstand wind pressure of 60 pounds per square foot on its flat surfaces, when in fact the tower collapsed under less wind pressure than that for which it was warranted." (A-111)

The jury returned a verdict pursuant to special interrogatories under which it found that Petitioner was not negligent and not strictly liable. Its verdict against the Petitioner was premised *solely* on the claim that the tower's collapse constituted a breach of the express warranty.

The Appeal

On appeal, Petitioner advanced two grounds for reversal. The first was that Item 9 of the parties' contract had been erroneously interpreted by the District Court. Four issues pertaining to the claimed time and damage limitations on the specification warranty were raised by Petitioner and argued at length. The second ground was that there was no evidence to support the verdict based on a breach of the design specification warranty, because Respondent had introduced no evidence that the force of the wind had caused the collapse. Throughout

both its briefs, Petitioner repeatedly asserted that the only warranty involved in the proceedings was the design warranty. (A- 185, 214, 272)

The Respondent never challenged Petitioner's assertion that only the design specification was at issue and its brief simply mirrors the legal issues raised by Petitioner. Respondent sought to sustain factually the jury verdict in a very simplistic manner. (A-267) It argued that since the specification guaranteed that the tower would be designed to resist a wind velocity of 120 miles per hour and since the wind velocity was less than that when the tower collapsed, that circumstance was sufficient causational proof to establish a breach of "the express [design] warranty."[4] It made this argument despite the fact that its own experts had testified that the tower's collapse resulted, not from the force of the wind, but rather from harmonic resonance—the avoidance of which had been established to be beyond the state of the art for tall towers.

The Opinion Of The Court of Appeals

The Opinion acknowledges that Respondent's experts *"unequivocally"* agreed that the tower met the design specifications. Indeed, the Opinion says that Petitioner had *convinced* the Court of Appeals that Respondent had not proved a breach of that express warranty. (A-6)

But the Court of Appeals goes on to sustain the verdict—not on the basis of any argument advanced by the

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[4] Respondent persisted throughout the trial and the appeal in relying on the totally inapplicable theory of *res ipsa loquitur,* despite the fact that the District Court had quite properly instructed the jury that:

> "The defendant was not an insurer of the safety of the tower nor does the mere occurrence of a collapse create any inference of a breach of any warranty." (A-116)

If Respondent was relying on the warranty perceived by the Court of Appeals, it would not have been necessary to resort to such a tenuous argument in support of the jury verdict.

parties—but rather on a theory it apparently concocted on its own. The essence of the Court's rationale sustaining the verdict against Petitioner was that two of its advertising brochures—reviewed by Respondent prior to its purchase of the *first* tower in 1966—contained "affirmations" which the Court said created a warranty regarding the tower's durability and performance. This new warranty the Court said was not limited in any way by Item 9 of the contract and was of *presumably* unlimited scope and duration. The so-called "affirmation" seized upon by the Eighth Circuit from the advertising brochures was:

> "Wind force creates the most critical loads to which a tower is normally subjected. When ice forms on tower members thereby increasing the surface area resisting the passage of wind, the load is increased.
>
> Properly designed towers will safely withstand the maximum wind velocities and ice loads to which they are likely to be subjected. Dresser-Ideco can make wind and ice load recommendations to you for your area based on U.S. Weather Bureau data."[5] (A-6)

The advertising brochures, although introduced in evidence (Exhibits 1 and 2), were received for a limited purpose and had never been urged by Respondent in the appeal or otherwise as the source of a separate and broader warranty. On the contrary, they were relied upon by Respondent exclusively to establish the origin of the design specification and to establish that "60 psf on the flats" equated to a wind velocity of 120 miles per hour. (A-241, 243) Nevertheless, the Court of Appeals construes the brochure language to mean that Petitioner had warranted that its towers would forever *"withstand the maximum wind velocity and ice load to which it would likely be subjected."* (A-7)

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[5] Exhibit 2, which is the brochure containing the quoted language, is reproduced in Appendix D at page A-292. Exhibit 1 is a fold out pamphlet and not readily reproducible.

Having created this new warranty, the Court of Appeals was faced with the dilemma of finding evidence of a breach. Respondent's experts had unequivocally stated that *neither* the wind nor ice nor a combination thereof were factors in the collapse of the tower, but that harmonic resonance was the most likely cause. Not to be discouraged in its effort to find a breach of its weather related warranty, the Court of Appeals adopts Petitioner's evidence that ice loading had caused the tower to collapse and speculates that the wind and ice loading testified to *by Petitioner's experts* could have been found by the jury to be the cause of the collapse and resultant breach of the warranty fashioned by the Court of Appeals.

The tortured analysis offered by the Court of Appeals is pathetically anomolous—at least from Petitioner's point of view. Respondent went to great pains during the trial to prove that no ice existed and the District Court's Memorandum Opinion states that:

> "The jury apparently found that the presence of ice and snow on the tower at the time of collapse, if any, had been insufficient in amount to be a causal factor in the collapse." (A-20)

Respondent's perception of what the jury did with the ice and snow theory advanced by Petitioner is that it was "rejected" by the jury. (A-241)

Having gone outside the written contract between the parties to find a warranty and having developed its own theory of breach, the Court of Appeals then had to overcome the hurdles posed by Item 9. The Eighth Circuit simply begs these questions by saying it is unnecessary to consider whether the duration of Petitioner's warranty and the remedy available in the event of a breach were limited by Item 9, since the new warranty was "outside" the contract. (A-12)

The Court of Appeals could not escape Item 9 entirely, since it purports to disclaim *all* warranties not in the contract and would presumably nullify this new extra-contractual war-

ranty. Despite not a word in the briefs and no ruling below on this issue, the Court of Appeals proclaims that its 'extra-contractual warranty is immune from Item 9 because to enforce the disclaimer contained therein would ostensibly create an inconsistency forbidden by the U.C.C. (A-14)

The Petition For
Rehearing En Banc

Petitioner duly filed a petition for rehearing urging the serious errors committed by the Court. Perhaps the most dramatic evidence that the panel Opinion is utterly confounding is expressed in the dissent to the denial of the petition for rehearing.

The author of the dissent is the Chief Judge of the Court and had originally joined in the panel Opinion sustaining the District Court. In his dissent, Chief Judge Gibson severely criticized the panel Opinion for its unpardonable trespass on the parties' agreement based on convoluted reasoning. The dissent concludes with this observation:

> "To suppose that the limitation on remedy contained in the contract was intended to apply only to the warranties contained in the written agreement but not to those in the catalog, is to build a fantasy on top of a fiction. Under U.C.C. § 2-719(1), S.D. Compiled Laws, § 57-8-49, the parties are entitled to limit remedies. To further certainty in commercial relationships and justice between these parties, we ought to enforce the contract as written." (A-17)

THE WRIT SHOULD BE GRANTED FOR THE FOLLOWING REASONS

I. The Theory Developed By The Court of Appeals Was Not Argued At Trial or On Appeal

When the Court of Appeals determined, *sua sponte,* that the verdict was sustainable on the basis of an express warranty contained in advertising brochures, it effectively deprived Petitioner of its day in court both at trial and in the Appeal. The theory adopted and advanced by the Court of Appeals was never considered by the parties or by the District Court as a basis for Petitioner's liability. *That fact is obvious from the record.*

The Evidentiary Status
Of The Advertising Brochures

The advertising brochures cannot and should not have been given the probative weight attached to them by the Court of Appeals. Respondent never urged to the jury that the brochures were introduced for the purpose of establishing a broad express warranty. Moreover, the trial judge expressly negated—in the presence of the jury—the evidentiary import which the Court of Appeals attached to those exhibits.

Respondent's first witness identified Exhibits 1 and 2 and none of Respondent's witnesses ever testified about them again. He characterized the material as sales *"propaganda sheets,"* which were received prior to the *first* tower contract in 1966. The insignificance of these brochures to the transaction is borne out by a review of the meager and superficial testimony concerning them. (A-36 to 43) Most significantly, when the exhibits were offered in evidence the following colloquy took place in the presence of the jury:

Mr. Doyle: If the Court please, we have no objection to the admissibility of Exhibit number 2, as it's our understanding that this material is *only preliminary,* and that in accordance with our discussion with the Court, at least at this point, we do not object to the exhibit, as such, *if it's only preliminary.*

The Court: Well, I don't know whether Mr. Evans is going to concede that it's only preliminary.

Mr. Evans: Well, I think it's part of the plaintiff's case, Your Honor, as I put the pieces together.

The Court: Well, I guess I better take a look at it if I'm going to have to rule on it. *I might just add that I don't regard Exhibits 1 or 2, either one of them, as being part of the contract, and if there's a later contract that's to be introduced, that would supersede* [20] *the brochures,* but Exhibit 2 will be—the objection to Exhibit 2 is overruled and it may be received in evidence. (Emphasis supplied). (A-42)

Since Respondent did introduce the contract, which under the District Court's ruling superseded the brochures, they could not have been relied upon by the jury to "amplify" or expand that written agreement between the parties. Respondent's counsel was silent after the District Court's ruling and throughout the remainder of the trial never once—before the jury or otherwise—suggested that Petitioner had guaranteed in its brochures that the durability and performance of the tower would *exceed* the specification design criteria.

Respondent's Case Was Predicated Exclusively On the Specification Warranty

At no time did Respondent suggest, either explicitly or by implication, that the brochures' function was the creation of a separate and expanded warranty. Yet it had numerous opportunities to do so.

In his argument in support of a directed verdict counsel for Petitioner asserted that:

> "(t)he testimony was clear that the only express warranty that is claimed is sixty pounds per square feet on the flats . . . " (A-51)

To this assertion, Respondent remained silent. Furthermore, on two occasions during the course of the same argument, the District Court commented on Respondent's failure to offer any evidence that Petitioner had breached the 60 psf design specification warranty. (A-55, 61) Yet Respondent did not attempt to remedy that potentially fatal evidentiary defect with any suggestion that some other express warranty might be available.

The most liberal construction of the evidence usually appears in a party's closing argument to the jury. (See A-76) But counsel for Respondent never once suggested to the jury that the brochures contained an express warranty, other than the specification warranty allegedly breached by Petitioner. Moreover, Respondent's counsel never urged that these brochures somehow "amplified" the contract specification beyond its intended and clear meaning as presumed by the Court of Appeals.[6] While the advertising exhibts were alluded to in closing argument, counsel's statements (A-77, 101) never suggested they were the source of a contractual guarantee beyond the specification warranty. Moreover, it offered not a single

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[6] It is clear from Respondent's brief that the "amplification" it was referring to was that the brochures contained a wind table to equate the specification to a wind velocity. As stated by Respondent in its brief to the Court of Appeals:

> "The District Court held as a matter of law that the 60 psf specification, as amplified in the brochure of Dresser, created an express warranty that the tower would withstand a wind velocity of approximately 120 miles per hour. This warranty was subsequently breached when the tower collapsed under the force of an 80 mile per hour wind." (A-244)

instruction which would have permitted the jury to consider the brochures as the source of a separate warranty.

Even more telling, Respondent allowed the following instruction to the jury:

> "If you find that the pertinent tower specifications were set by the plaintiff or by its direction, and if you find that the tower supplied by the defendant conformed to those specifications, then there can be no breach of an express warranty on the part of the defendant." (A-121)

If Respondent had intended to rely on some extra-contractual warranty it could not have allowed this instruction, since it is fatal to the very theory which the Court of Appeals evolved and Respondent now urges.

Perhaps the most compelling evidence that Respondent never "tried" to the jury the question of whether the brochures contained a warranty is found in Respondent's comprehensive brief in opposition to Petitioner's motion for judgment notwithstanding the verdict. (A-130) In the very first sentence of its brief, Respondent characterizes the jury verdict as follows:

> "By its verdict, the jury found that the Defendant had breached *the express warranty contained in the typewritten specifications of the contract to-wit* . . . " [60 psf on the flats]

Respondent then goes on to list eleven separate grounds why the verdict should be sustained, not one of which even hints at a warranty contained in the advertising brochures. For that matter, Exhibits 1 and 2 are not even referred to or cited in the entire brief. Respondent concludes its lengthy legal argument with this parting statement:

> "The Defendant made an explicit and specific warranty when it stated:

> 'The tower shall be designed to resist a uniform wind load per drawing T-5172, Sheet S-1, 60 psf on flats.'
>
> When the tower failed there was a breach of this express, specific warranty." (A-170)

Finally, it is clear from the Memorandum Opinion that, at least in the District Court's view, the only warranty Petitioner had made and the only warranty the jury could have found breached was contained in the contract specifications.[7]

In The Appeal, A "New"
Warranty Was Never Urged
By The Respondent

If the Court of Appeals' perception of the record is legitimate, one would expect to find—either in Petitioner's or Respondent's brief—some hint that the brochures compel such a dispositive result. Yet one can search with meticulous care and find not even a suggestion that they create an express warranty outside of and going beyond the contract or that such a warranty was ever breached. On the contrary, beginning with the "Statement of Issues" the briefs of both parties are devoted exclusively to the legal and factual disputes surrounding the specification design warranty. (See A-172, A-220, A-270)

Respondent's brief never once challenges the repeated assertion by Petitioner that the *only* warranty at issue is the

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[7] "The specifications incorporated in the contract for sale disclosed that 'The tower shall be designed to resist a uniform wind load per drawing T-5172, Sheet S-1, 60 psf on flats.' . . . Defendant's advertising brochures stated that the wind velocity necessary to create this amount of pressure would be approximately 120 miles per hour, absent any other factors. This court found as a matter of law that this specification created an express warranty. . . .

The jury's answers to the special interrogatories submitted to them by the Court show that they based Defendant's liability on a breach of *the* express warranty." (A-21)

design specification. There are, indeed, some passing references by Respondent to the brochures, but never in the context of a separate and broader warranty. In fact, all such references relate to establishing that the 60 psf warranty was first explained by Petitioner in its advertising and later codified in the written contract. (A-229, 241, 245, 249, 255)

Moreover, why is there no discussion in any of the briefs about what turned out to be the crucial legal decision by the Court of Appeals—namely whether Item 9 operated to disclaim the new extra-contractual warranty? The reason is painfully obvious! That question had never been considered by the District Court because there was no occasion for the parties to address that issue at trial.

While it is obviously very tempting for Respondent to denounce righteously the charge that it was the Court of Appeals—not it—which molded a theory to sustain the verdict, the opening paragraph of Respondent's "Argument" to the Court of Appeals suggests otherwise:

> "During the negotiation process for the tower contract, in its brochure and in the final order form, Dresser explicitly guaranteed that the subject tower was designed to safely withstand a horizontal wind pressure of 60 psf on flat surfaces. This is equivalent to an actual wind velocity of approximately 120 miles per hour. The District Court properly held as a matter of law that this design guarantee created an express warranty. The tower design proved inadequate." (A-241)

Respondent Expressly Rejected The Theory Adopted By the Court of Appeals

The Court of Appeals overlooked an admission in Respondent's brief which is directly contrary to the dispositive

conclusion it made. In discussing Petitioner's defense that ice and snow in combination with the wind had caused the collapse, Respondent made this fatal concession:

> "Dresser's theory, if correct, provided a complete defense to the breach of warranty cause of action." (A-236)

Yet the Court of Appeals speculates that the evidence of ice and snow plus the wind could have been found by the jury as the cause of the collapse and the basis for its verdict that Petitioner had breached the newly created advertising warranty. There is no conceivable way to square Respondent's statement with the rationale seized upon by the Court of Appeals. It reveals, perhaps more than anything else, that the idea to elevate the brochures to their dominant position in this case was conceived solely by the Court of Appeals.[8]

II. The Decision Rendered By The Court Of Appeals Is Predicated On Legal Determinations Not Raised Or Argued By The Parties

Having found what it perceived to be evidentiary support for the verdict, the Court of Appeals was then required to resolve a number of legal issues—none of which had been briefed or argued by the parties.

The Application Of The Parol Evidence Rule. The Opinion of the Court of Appeals literally begs for a discussion of the parol evidence rule in connection with the brochures. Given the fact that the District Court said that the written contract "*would*

[8] This admission renders incredible the indignant assertions by Respondent that the references to the brochures in its brief show that it urged in the appeal the theory seized upon by the Court of Appeals.

supercede the brochures," some explanation was necessary to explain how this rule can be legitimately avoided. Petitioner never raised this issue on appeal because Respondent had never relied on the brochures as the source of a warranty. Respondent's assertion in the response to the Petition for Rehearing that Petitioner had "waived" this issue is simply specious. The very fact that no parol evidence argument was made by *either* party at trial or in the appeal is convincing proof that no one ever perceived that the brochures could be elevated to the evidentiary stature suggested, in the first instance, by the Court of Appeals.

The creation of a warranty through the advertising brochures was both factually and legally impossible. Those brochures, submitted three years before and in connection with a separate transaction, are by definition extrinsic to the contract in this case. As such, they may be given legal significance *only* if that contract was either vague or ambiguous, or failed to be a final and intergrated expression of the parties' intent. But at no time was the contract argued or found to be so deficient.[9]

Warranty Disclaimer Provision. Having elevated the brochures to contractual stature, the Court of Appeals was faced with a serious dilemma. Item 9 of the contract said, in what the District Court found to be clear and conspicuous language, that:

> "THE FOREGOING IS EXPRESSLY IN LIEU OF ALL OTHER WARRANTIES WHATSOEVER, EXPRESS, IMPLIED AND STATUTORY, INCLUDING WITHOUT LIMITATION, THE IMPLIED WARRANTIES OF

[9] In this connection, the Court of Appeals conveniently ignored the very first paragraph of the "Terms and Conditions of Sale." "1. General: All sales by DRESSER ... (hereinafter called Seller) are made subject only to these terms and conditions and no others unless expressly modified in writing and signed by an authorized representative of the Seller at its home office. Verbal arrangements and the terms and conditions of any purchase orders submitted by the Buyer shall be of no force and effect." (A-318)

> MERCHANTABILITY AND FITNESS. IT IS SPECIFICALLY UNDERSTOOD SELLER'S PRICE IS BASED UPON THE FOREGOING LIMITATION OF LIABILITY AND BUYER'S WAIVER OF ANY AND ALL CLAIMS FOR DAMAGES."

The issue of whether this contractual provision effectively disclaimed the new advertising warranty had never been raised, argued, briefed or even discussed by anyone at any stage of the entire proceeding. Despite this, the Court of Appeals simply declares that the warranty disclaimer is inoperative because it cannot be construed consistently with the new warranty which it found outside the contract. Of course not! That was precisely its purpose—to exclude all warranties except those expressly agreed upon by the parties in their contract.

The Court of Appeals justifies its bizarre and extremely prejudicial holding on Section 57-3-34 of the South Dakota Uniform Commercial Code. (A-13) However, with a rather surprising display of judicial myopia, the Court of Appeals overlooks the fact that this provision is expressly subject to the parol evidence rule.[10] We are left to wonder just what sort of legal manipulation can justify obliteration of such a contractual provision. Twice Respondent executed that contract. Twice its representatives signed directly below Item 9. And twice it paid a price which it knew was predicated on the very disclaimer which it now repudiates.

It is shockingly apparent that in order to justify a preconceived theory the Court of Appeals was merely bootstrapping. First, the Court ignores the parol evidence implications inherent in establishing a new warranty through the brochures in the first instance. Then it compounds that error by not even addressing itself to the express parol evidence caveat in the very

[10] S.D. Compiled Laws Ann. § 57-4-34, U.C.C. § 2-316(1), provides: *Construction of words or conduct tending to negate or limit express warranty inoperative.* Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent with each other; *but subject to the provisions of chapter 57-3 on parol or extrinsic evidence (§ 57-3-4)* negation or limitation is inoperative to the extent that such construction is unreasonable. (Emphasis supplied)

statute it relies on to immunize the newly discovered warranty from certain extinction.[11]

Ironically, if the Respondent had actually attempted to assert and prove at trial that the brochures were the source of an express warranty, it is likely that the District Court would have ruled that they could not be as a matter of law. The District Court had enforced the warranty disclaimer to negate all implied warranties, which are nothing more than extra-contractual guarantees which the law presumes exist unless disclaimed. Furthermore, the trial court did, in fact, apply the parol evidence rule when it said the brochures would be "superseded" by the contract.[12]

Limitation of Remedy. At trial and in its briefs to the Court of Appeals, the Petitioner vigorously sought to enforce a provision that was at the very heart of the parties bargain—a limit on its financial exposure. Given the expensive nature of the structures it sold and recognizing that prices were escalating in the industry, Petitioner prudently placed a limit on the amount for which it would be liable to its purchasers in the event of a defect—the maximum amount being a refund of the entire purchase price.

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[11] The case offered by the Court of Appeals to support its holding demonstrates how superficially this issue was considered by the Court. In *S-C Industries* v. *American Hydroponics System, Inc.*, 468 F.2d 852 (5th Cir. 1972), the issue was whether a technical specification contained in the written plans for the structure was a warranty and, if so, whether it was negated by exclusionary language in the purchase order. Obviously, this was a clear case of an inconsistency within contemporaneous contract documents as opposed to an inconsistency between the contract disclaimer and extrinsic and prior language which the Court of Appeals was faced with here. Stated differently, the Court in the *S-C Industries* case had no occasion to consider the parol evidence rule.

[12] Carried to its logical extreme, what the Court of Appeals is suggesting by its holding is that no warranty disclaimer can ever be effective because by its very nature it would be inconsistent with all extra-contractual warranties.

The Court of Appeals ignores the legal discussion offered by the parties and avoids a decision about whether Petitioner's contractual damage limitation is valid. The Court takes the easy way out by concluding that the limitation applies *only* to damages arising out of breaches of contractual warranties—but of course (says the Court) the express warranty here involved is *outside* the contract.

The Chief Judge of the Court of Appeals was so outraged by this convoluted and specious reasoning (which he said "presents a serious question of injustice") that he authored a dissent to the denial of the petition for a rehearing. In taking the court to task for its actions the Chief Judge said:

> "To suppose that the limitation on remedy contained in the contract was intended to apply only to the warranties contained in the written agreement but not to those in the catalog, is to build a fantasy on top of a fiction." (A-17)

Finally, it should be observed that the opinion of the Court of Appeals is internally inconsistent. When the Court said it did not have to consider that issue because the new warranty was outside the contract, it was ignoring the language in its own opinion which said that the "affirmation" appearing in the brochures only "amplified" and gave full meaning to the contractual specification. (A-6) If the advertising warranty was actually only an amplification, rather than a separate warranty, then it would be subject to the same limitations as the specification. If that is the basis of the Court's decision, we respectfully suggest that the Court of Appeals could not properly avoid considering whether Petitioner's damage limitation provision is operative.

Petitioner would most assuredly wish to have been heard on the foregoing legal issues decided by the Court of Appeals. Not only was Petitioner prejudiced in the resolution of this dispute, but in other disputes that may arise in the future regarding its towers. The opinion arguably establishes a

warranty on all of Petitioner's towers that they will stand forever absent a storm of proportions not contemplated—whatever that means.[13] Of more immediate concern, the Court of Appeals' rejection of the Item 9 warranty disclaimer and its refusal to apply the damage limitation provision could seriously impact the Petitioner in the pending consequential damage action brought by Respondent's two television stations. (See fn. 2 at page 3 above)

III. The Court Of Appeals Violated Basic Principles Of Appellate Review In This Case

The judicial performance of the Court of Appeals in this case makes a mockery of Petitioner's right to have the trial record scrutinized by an impartial court of review within the context of issues framed by the parties. The foregoing illustrates beyond any doubt that the decision rendered by the Court was, for all practical purposes, arrived at in a total vacuum without the benefit of any written or oral ventilation by the parties.

A reviewing court is not free to reshape the case presented to it. Cases must be decided on the basis of the facts developed at trial and the issues presented to the reviewing court, not on the basis of theories for which the reviewing court assumes evidence could have been provided. This concept, central to our adversary system, was outlined by this Court in *Hormel* v. *Helvering*, 312 U.S. 552 (1941):

[13] The Opinion states that the 6 month warranty limitation in Item 9 is inapplicable to the express warranty found outside the written contract, because it applies only to warranties contained in the contract. This reasoning does not establish that this warranty was still in effect because the U.C.C. provides that, in the absence of express language, all warranties—whether in a contract or not—last only 4 years. See *Binkley Co.* v. *Teledyne Mid-America Corp.*, 333 F.Supp. 1183, *aff'd.*, 460 F.2d 276 (8th Cir. 1972), and the discussion in Petitioner's Brief, A-195 to 198.

> "Ordinarily an appellate court does not give consideration to issues not raised below. For our procedural scheme contemplates that parties shall come to issue in the trial forum vested with authority to determine questions of fact. This is essential in order that parties may have the opportunity to offer all the evidence they believe relevant to the issues which the trial tribunal is alone competent to decide; it is equally essential in order that litigants may not be surprise on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence." (312 U.S. at 556)

The Court of Appeals ignored its own rules in deciding this case. One of the underlying purposes of Rule 28 of the Federal Rules of Appellate Procedure is to establish the scope of the appeal so that the reviewing court will have before it precisely what errors the Appellant claims and the reasons why the Appellee believes no errors were committed and why the verdict should be affirmed. Proper judicial administration—let alone basic fairness to the parties—dictates that there be a semblance of order to the appellate process. In *Smith* v. *American Guild of Variety Artists*, 368 F.2d 511 (8th Cir. 1966), cert. denied, 387 U.S. 931 (1967), the Court of Appeals for the Eighth Circuit acknowledged that the briefs of the parties should control the scope of the court's review.

> "Questions not raised, briefed nor argued will ordinarily be given no consideration by an appellate court. *Trailmobile Co.* v. *Whirls*, 331 U.S. 40, 50, 67 S.Ct. 982, 91 L.Ed. 1328; *Pacific States Box & Basket Co.* v. *White*, 296 U.S. 176, 186, 56 S.Ct. 159, 80 L.Ed. 138.
>
> * * *
>
> We believe that this case falls within the general rule to the effect that issues not raised in the trial court or upon appeal cannot be considered." (368 F.2d at 514-15)

The Court of Appeals for the Seventh Circuit expressed the rule in even stronger terms. In *United States* v. *White*, 454 F.2d 435 (7th Cir.), cert. denied, 406 U.S. 962 (1972), the court said:

> "Rule 28 of the Federal Rules of Appellate Procedure (28 U.S.C. Rules) has been interpreted to require that all issues be set out in the appellant's brief and the respondent's answer, and failure to comply may constitute a waiver." (454 F.2d at 439)

The Court of Appeals apparently forgot about this Rule because it totally ignored the issues as framed by the parties and decided the appeal solely on its own perception of the facts and law.

In the rare instances when consideration of the issues not briefed to the reviewing court and fully litigated below is appropriate, the reviewing court should not proceed without the benefit of arguments from the parties. In *Spokane County* v. *Air Base Housing, Inc.*, 304 F.2d 494 (9th Cir. 1962), the court made this observation:

> ". . . appellee may support the judgment by any reasoning from facts disclosed in the record, no matter when the objection is raised, although the appellant must of course have an opportunity to answer." (304 F.2d at 497)

When, as here, a reviewing court develops its own legal theory for a case, and proceeds to base its decision upon it, the parties are deprived of an opportunity to demonstrate to the court the flaws of its reasoning. Errors of fact or law are invariably made to the prejudice of at least one party and to the detriment of our entire judicial system.

IV. Petitioner Was Denied Its Right To A Jury Trial By The Disposition Of This Case In The Court Of Appeals

One of the dangers in allowing appellate courts to reshape the issues is that in doing so the courts will proceed to determine the facts necessary to support those theories and thereby usurp the function of the trier of facts. This Court has cautioned against the exercise of such power. In *Securities*

Exchange Comm'n. v. *Chenery Corp.*, 318 U.S. 80 (1943), Mr. Justice Frankfurter said:

> "But it is also familiar appellate procedure that where the correctness of the lower court's decision depends upon a determination of fact which only a jury could make but which has not been made, the appellate court cannot take the place of the jury." (318 U.S. at 88)

Litigants, like Petitioner, have a right under the Seventh Amendment to a determination by a jury of the claim alleged against it. When a reviewing court bases its decision on facts not determined at trial, as the Court of Appeals did in this case, this constitutionally protected right is seriously abridged. As observed in *Securities Investor Protection Corp.* v. *Morgan, Kennedy & Co.*, 533 F.2d 1314 (2nd Cir.), cert. denied, 426 U.S. 936 (1976):

> "The Supreme Court has cautioned against the consideration, on review, of issues not reached by the lower court and not adequately presented in the reviewing tribunal. . . . Where, as here, there may be a need for findings of fact before a decision can be rendered, that caution takes on added dimension. [Citations omitted.] (533 F.2d at 1322)

But the Court of Appeals decided this case by developing its own "theory" of the case, and by manipulating the facts and the law to make that theory superficially defensible.

One fact essential to the Court of Appeals' theory is that the advertising brochures created a warranty. Whether extra-contractual statements can rise to the stature of an express warranty is a question of fact for the jury. That question cannot be determined by either the trial court on a motion for summary judgment, or by a reviewing court considering the question for the first time on appeal. See, e.g., *Matlack, Inc.* v.

Rupp Corporation, 57 F.R.D. 151, 156 (E.D. Pa. 1972), *Pacific Marine Schwabacher, Inc.* v. *Hydroswift Corp.,* 525 P.2d 615 (Utah 1974); *Sinka* v. *Northern Commercial Co.,* 9 U.C.C. Rep. 1350 (Alas. 1971); *Putensen* v. *Clay Adams, Inc.,* 91 Cal. Rptr. 319 (1st Dist. 1970); *Alan Wood Steel Co.* v. *Capital Equipment Enterprises, Inc.,* 39 Ill.App.3d 48, 349 N.E.2d 627 (1976).

As stated earlier, the question of whether an extra-contractual warranty has been created is predicated on the initial finding that the contract is deficient, either because it is vague or ambiguous, or because it fails to be a final and integrated expression of the parties' intent. Even when that preliminary determination has been made, that question may only be taken from the jury when there is "no room for reasonable doubt" as to the warranty's existence. In *Gillette Dairy, Inc.* v. *Hydrotex Industries, Inc.,* 440 F.2d 969 (8th Cir. 1971), the Court of Appeals held that "the question of whether the warranties on the sales invoices were affirmations of fact which became part of the basis of the bargain was properly submitted to the jury," because "the evidence was not so predominant as to the existence of the express warranties to take this issue from the jury." (440 F.2d at 974)

Under the circumstances presented here, it is pure fantasy to suggest that the jury did or even could have made the factual determinations necessary to support the theory advanced by the Court of Appeals. The brochures were consulted prior to the negotiation of the first contract in 1966, but not during the negotiations for the second contract. Respondent's only witness on the subject described the brochures as "propaganda sheets." The jury was told by the District Court that the advertising literature would be "superseded" by the contract. Finally, there was no instruction suggesting that the jury could consider the advertising statements as warranties without regard to the warranty disclaimer contained in Item 9 of the contract or otherwise.

The Court of Appeals acted beyond the scope of its proper role as a reviewing court when it—not the jury—found that the advertising brochures were part of the bargain; that they were relied upon; that certain language in the brochures constituted an express warranty, which was not nullified by Item 9; that ice and wind had caused the tower to collapse and that this was a breach of warranty. Such action constitutes a clear denial of Petitioner's right to a determination of its case by a jury as guaranteed by the Seventh Amendment and this Court should not condone this manifest injustice.

V. The Court of Appeals' Decision Leaves Commercial Transactions In A State of Uncertainty

The Uniform Commercial Code, now adopted in almost all the states, was intended to establish uniformity and certainty for increasingly complex business transactions which now predominate our economy. To accomplish this goal, the Code reinforces the sanctity of contract as the desirable vehicle with which to formulate the multitude of responsibilities and risks present in sophisticated business dealings. Section 1-102 of the Code states as follows:

> "(2) Underlying purposes and policies of this Act are
>
> (a) to simplify, clarify and modernize the law governing commercial transactions;
>
> (b) to permit the continued expansion of commercial practices through custom, usage and agreement of the parties;
>
> (c) to make uniform the law among the various jurisdictions."

The decision by the Court of Appeals reflects a total disregard for what was the *actual* as opposed to the judicially presumed agreement between the parties. The rhetoric of the Opinion reveals an alarming lack of judicial sensitivity for what transpires in the real world of business. For example, when the

Court theorizes that the brochures exchanged by the parties several years before the sale in question were part of the "fabric" of their agreement and must be read in "tandem" with and considered part of the "basis of the bargain" between the parties, it is fantasizing in order to justify a judicial reformation of a complete and integrated contract in which the parties allocated their respective risks at the time the transaction was consummated. The Court is simply deluding itself, to justify a result, when it suggests that either Petitioner or Respondent "intended"—or for that matter even considered for a moment—that the brochures were part of their bargain.

We cannot resist calling this Court's attention to an expression of policy made by the same panel that decided this case. In *Geldermann and Co.* v. *Lane Processing, Inc.*, 527 F.2d 571 (8th Cir. 1975) Chief Judge Gibson joined by Judges Lay and Stephenson, said:

> "It is not the province of the courts to scrutinize all contracts with a paternalistic attitude and summarily conclude that they are partially or totally unenforceable merely because an aggrieved party believes that the contract has subsequently proved to be unfair or less beneficial than anticipated." (527 F.2d at 576)

It is difficult to comprehend what would cause three judges to change so dramatically their legal philosophy. The Chief Judge obviously had second thoughts and ultimately perceived the case, at least partially, in its proper context and recognized the inherent danger of after the fact judicial intrusion into delicately negotiated commercial transactions. This was not a consumer dispute or one between a corporate giant and its intimidated customer. Rather—as the Chief Judge correctly observed—this is a controversy between:

> "two substantial commercial corporate entities, experienced in the technical world of broadcasting. They had dealt with one another before and were aware of the risk that broadcast towers entail and that towers sometimes fall."

One can only speculate about the impact of this decision—and the philosophy underlying it—on the business community. What more could a seller do to disclaim extra-contractual warranties than what Petitioner did here? Large bold face type appearing immediately above the signature line of the purchaser seems more than an adequate expression of the parties intent.

In the same vein, how does a seller of expensive and complex equipment in our inflationary economy bargain for a limit on its financial exposure? Again, the Petitioner bargained for what was, at the time of the transaction, a mutual understanding regarding the allocation of this risk. It now finds that the judiciary does not agree.

Terms governing warranties and the scope of financial loss unquestionably have a direct bearing on the price of the goods sold. In fact, the competitor of Petitioner who installed Respondent's third tower testified that he would not have sold the tower to Respondent without such terms and conditions. (A-46) If sellers cannot effectively negotiate terms and conditions with a sense of certainty that the courts will enforce them, they will have no recourse but to reflect that risk in the price or to refrain entirely from the development of complex equipment.

Respondent chose to pay a price for the tower which it knew was predicated on the assumption of certain risks. Having paid that price it should not be allowed to reap the benefits of an entirely rewritten agreement. To allow the judiciary to intrude itself into such commercial transactions in the manner and under the circumstances portrayed herein provokes a policy question of the highest magnitude affecting the very stability of our economy. It is a question, we respectfully suggest, that is deserving of this Court's attention.

VI. This Court Should Exercise Its Responsibility To Supervise The Administration Of Justice In The Federal Courts

Supervision of the Federal courts and the safeguarding of the integrity of the appellate process is ultimately entrusted to this tribunal. In fulfillment of this responsibility, this Court in the past has exercised its certiorari jurisdiction to correct manifest injustices arising out of substantial departures from ordinary appellate practice. In *Lutcher & Moore Lumber Co.* v. *Knight,* 217 U.S. 257 (1910), this Court exercised its certiorari jurisdiction and remanded the case to the appellate court with instructions to consider the case presented to it—not the case as the court had preferred to view it. There, the trial court had refused to admit certain evidence. The Appellate Court affirmed this ruling, but on grounds obviously contrary to the trial court's understanding of the case. This Court stated that:

> "in a case like this we think the judgment of the Circuit Court of Appeals must be reversed and the case be remanded to that court to the end that the duty to hear and decide it may be performed." (217 U.S. at 268)

Again, in *Fountain* v. *Filson,* 336 U.S. 681 (1949), this Court took action when a court of appeals entered a judgment based on theories not litigated at trial and for which the facts had not been fully developed. There, the court of appeals reversed summary judgment for the defendant, but then entered summary judgment for the plaintiff in a suit over title to realty. This Court reversed and remanded saying:

> "[H]ere the order was made on appeal on a new issue as to which the opposite party had no opportunity to present a defense before the trial court. . . . There was no occasion in the trial court for [the defendant] to dispute facts material [to the theory of the court of appeals], since the only claim considered by that court was the claim [on which the judgment below had been based] . . . [I]t was error . . . to deprive [defendant] of an opportunity to dispute facts material to that claim . . ." (336 U.S. at 683)

We respectfully suggest that the same factors which motivated this Court to reverse and remand in *Lutcher* and *Fountain* are present and equally compelling here. The Court of Appeals assumed the role of advocate, judge and jury in this case. To suggest, under those circumstances, that Petitioner was afforded its minimal rights as a litigant is a rationalization without reason and a delusion with potentially dangerous consequences. When a court of appeals so radically departs from accepted appellate practice and impinges so acutely upon a party's rights, this Court should exercise its power of supervision to remind the Court of Appeals that its prerogatives are not unlimited and to re-establish the faith which litigants should have in the integrity of the adversary process.

CONCLUSION

The actions of the Court of Appeals in this case pose a serious threat to the proper administration of justice in the federal courts. Obviously, Petitioner is motivated in pursuing the matter this far by the financial impact which the decision has on its business both now and in the future. It is equally disturbed, however, as part of the business community, by the philosophy underlying the decision which suggests that a court may intrude itself into a commercial transaction and virtually rewrite the parties' agreement in order to justify a given result. The business community of this country should not be subjected to such judicial excess or, if it is to be, then it should come expressly from this Court. Accordingly, Petitioner respectfully

urges that a Writ of Certiorari be granted to review the decision rendered by the Court of Appeals for the Eighth Circuit.

Dated: March 8, 1979

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APPENDIX A

A-1

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 77-1750

Community Television Services, Inc., a Corporation, Appellee,	*	
v.	*	Appeal from the United States District Court for the District of South Dakota.
Dresser Industries, Inc., a Corporation, Appellant.	*	

Submitted: February 17, 1978

Filed: September 13, 1978

Before GIBSON, Chief Judge, LAY and STEPHENSON, Circuit Judges.

LAY, Circuit Judge.

Dresser Industries, Inc. appeals from a judgment of the district court in the sum of $1,274,631.60,[1] awarded to Community Television Services, Inc. for damages arising from the collapse of a 2,000 foot television and radio broadcasting tower on January 11, 1975. Dresser designed, manufactured, and erected the tower for Community. The jury, answering special interrogatories, rejected Community's alternative claims of negligence and strict liability, but

[1] The jury actually assessed damages in the amount of $1,385,001.61. The trial court conditioned denial of Dresser's motion for judgment notwithstanding the verdict or in the alternative for new trial on remittitur of the damage award to the amount of the judgment. Community does not challenge the remittitur on appeal. See Community Television Serv. v. Dresser Ind., Inc., 435 F. Supp. 214 (D. S.D. 1977).

found for Community under breach of express warranty.[2] On appeal, Dresser argues that: (1) the verdict for Community is not supported by the evidence, and (2) the trial court erred in failing to enforce the limitation of liability provisions of the sale contract. Upon review of the entire record, we affirm the judgment for Community.

Background.

Community Television Services, Inc. is a corporate entity formed in about 1965 by two South Dakota based broadcasting stations, KELO and KSOO, for construction near Rowena, South Dakota, of a 2,000 foot tower to broadcast television signals for both stations. Contract negotiations were entered into with Dresser, who fabricated and erected the tower. The tower became operational in August of 1967. On June 22, 1968, the tower collapsed when an airplane clipped and severed a supporting cable. Dresser erected a replacement tower, which became operational in May of 1969. Included in the terms and conditions of the contract between Dresser and Community for the replacement tower was the warranty and limitation of liability provision at issue in this appeal. The only significant variance between the two contracts was an increase in the tower's price in 1968 to $385,000.

A relatively thin metal structure, the tower was comprised of a mast and three interconnected legs held in balance by guy cables set to an appropriate tension. An

[2]At the close of all the evidence, the trial court granted Dresser's motion for directed verdict on the implied warranty count, holding that disclaimer provisions in the sale contract complied with the South Dakota Commercial Code and were effective against implied warranties.

antenna was placed on top of the tower for broadcasting television and FM radio signals. Community had the tower regularly inspected and properly maintained. The only significant maintenance operation was retensioning of certain guy cables by an independent contractor retained by Community.

On January 10 and 11, 1975, a severe winter blizzard occurred in the area where the tower was located. During the early morning hours of January 11, as the storm reached its height with wind speeds near the top of the tower of up to 80 miles per hour, the tower collapsed. Expert witnesses called by both sides differed in their opinions as to the cause of the collapse. Community's experts testified that they had eliminated metallurgical or mechanical failure or abnormal wind loading as the cause of collapse. They theorized that the cause was high winds setting up a phenomenon known as mechanical resonance. They concluded that because of the resonance, the tower members "were inadequate to support the load that they sustained." On the other hand, Dresser's experts testified that a combination of ice, snow and wind subjected the tower to a total force greater than the ultimate capacity of its structural elements. They theorized that a substantial accumulation of rime ice[3] on the upper fourth of the tower enlarged the tower surface area exposed to the wind, thereby subjecting the tower members to a greater load than their designed wind loading capacity. Community attempted to refute Dresser's rime ice theory by calling several witnesses who testified that they did not see any such ice on or near the area where the tower

[3]Rime ice is formed when water droplets, existing in clouds at temperatures below freezing, instantaneously crystallize and freeze as they collide with a structure. In contrast to the more dense and clear glaze ice, rime ice is virtually indistinguishable from snow.

collapsed. In turn, Dresser countered Community's theory through expert testimony that relatively constant winds were necessary for resonance to begin, and the winds were gusty and varied in speed and direction at the time of collapse. Furthermore, Dresser argued that the warranty did not guarantee against mechanical resonance, and experts testified that its prevention was beyond the current state of the art.

Creation and Scope of the Warranty.

The specifications incorporated in the sale contract included a specified "Design Wind Load," which set forth the tower's capacity to withstand wind velocity as measured in pounds of pressure per square foot against the flat surfaces of its members. The specification reads: "The tower shall be designed to resist a uniform wind load per drawing T-5172, sheet S-1, 60 psf on flats." The trial court instructed the jury that this specification constituted an express warranty that the structure would withstand wind exerting pressure of 60 pounds per square foot on the flat surfaces of the tower.[4] Dresser's advertising materials and the testimony

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[4]U.C.C. § 2-313(a), (b), which was enacted by South Dakota without change, S.D. Compiled Laws Ann. § 57-4-25, 26 & 27 provides:

> Sec. 2-313. Express Warranties by Affirmation, Promise, Description, Sample.
>
> (1) Express warranties by the seller are created as follows:
>
> (a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.
>
> (b) Any description of the goods which is

of experts at trial revealed that the wind velocity necessary to create 60 pounds of pressure on the flat surfaces of the tower would be approximately 120 miles per hour. The evidence showed that the wind loading specifications referred, at least in engineering parlance, to "a force caused by the wind that is introduced parallel to the ground . . . [which] would be tending to blow the structure over."[5]

Dresser argues that the trial court erred in failing to direct a verdict on the express warranty claim or grant it

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4 (continued)

> made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.

Dresser concedes on appeal that the specification created an express warranty.

[5]The mathematical formula to compute the wind velocity necessary to exert 60 pounds of pressure per square foot is not contested and was described by one of Community's experts as follows:

> A. The density of air at sea level, using a standard atmosphere, is computed to be .002378 slugs per cubic foot, and if we use 60 pounds per square foot, that would be equal to then one-half this .002378 times the square of the air velocity in feet per second, so if we compute it back the other way, it would be -- I read that that would be about 224.6 feet per second in that case for a 60 psf load, and if we converted that to miles per hour, that would be about 153, I believe.
>
> Q. All right. That's 153 miles an hour?
>
> A. Yes.

This was described as a conservative figure, the highest wind speed that could exert 60 pounds of pressure. Lower speeds, such as the 120 miles per hour speed given in Dresser's advertising catalog, apparently result from use of a different figure for density, .003 or .004, in the equation.

judgment notwithstanding the verdict, because expert testimony that the tower met the design specification was uncontradicted. Community's own experts stated unequivocally that in their opinion the tower conformed in a mathematical or analytical sense to the 60 pounds per square foot wind loading specification. If the warranty may be restricted to the technical specification set forth in the written contract, we would find Dresser's argument convincing. However, we agree with Community that the warranty was amplified, in advertising materials Dresser gave to Community prior to purchase of the first tower, to promise more than mere compliance with technical measurements. In an advertising catalog, Dresser made the following supplementary affirmation:

> Wind force creates the most critical loads to which a tower is normally subjected. When ice forms on tower members thereby increasing the surface area resisting the passage of wind, the load is increased.
>
> Properly designed towers will safely withstand the maximum wind velocities and ice loads to which they are likely to be subjected. Dresser-Ideco can make wind and ice load recommendations to you for your area based on U. S. Weather Bureau data.[6]

Although we agree with Dresser that a seller cannot be held to be the insurer of its product, Dresser nevertheless

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[6] On another page, in a description of the towers, the following language appears:

> In the winter, loaded with ice and hammered repeatedly with gale force winds, these towers absorb some of the roughest punishment that towers take anywhere in the country . . . yet continue to give dependable, uninterrupted service.

provided the catalog to Community to induce purchase of its product, and in the absence of clear affirmative proof to the contrary, the above affirmation must be considered part of the "basis of the bargain." S. D. Compiled Laws Ann. § 57-4-26; Comment 3 to U.C.C. § 2-313; Drier v. Perfection, Inc., ___ S.D. ___, 259 N.W.2d 496, 502 (1977); Hawkins Construction Co. v. Matthews Co., 190 Neb. 546, 565, 209 N.W.2d 643, 654 (1973). Standing alone, the statements provide a warranty that Dresser's tower would be properly designed so as to safely withstand the maximum wind velocities and ice loads to which it would likely be subjected. Dresser did not indicate that this broad affirmation was superseded or cancelled by the technical specification in the contract. Cf. Braniff Airways, Inc. v. Curtiss-Wright Corp., 411 F.2d 451, 455 (2d Cir.), cert. denied, 396 U.S. 959 (1969), 400 U.S. 829 (1970). When the affirmation is read in tandem with the contract, as part of the "fabric" of the agreement of the parties, see Comment 3 to U.C.C. § 2-313, it enlarges the warranty created by the technical wind loading specification, giving evidence of its full intent and scope. See Collins v. Uniroyal, Inc., 126 N.J.Super. 401, 315 A.2d 30 (1973), aff'd 64 N.J. 260, 315 A.2d 16 (1974); Fargo Mach. & Tool Co. v. Kearney & Trecker Corp., 428 F. Supp. 364, 371 (E.D. Mich. 1977).

We find that the statements in the advertising catalog, which supplement the wind loading specification, could reasonably have been found by the jury to be an affirmation of fact or a promise concerning the actual durability or performance of the tower during the wind and ice storms to which it was likely to be subjected.

Proof of Breach.

Although Dresser's defense was that the tower collapsed

by reason of excessive loading due to ice on the tower members, no disclaimer or limitation of the warranty that a properly designed tower would safely withstand the maximum wind and ice loads to which it was likely to be subjected appeared in the advertising materials or the contract. Under the integrated warranty given, a purchaser could reasonably assume that the tower, if properly designed for its location, would withstand maximum wind speeds to which it was likely to be subjected, even if ice accumulated on the tower members. While the blizzard was a severe one, the evidence does not support the conclusion that the wind alone, or the combination of wind and ice which Dresser claimed caused the collapse, was not within the range of storm conditions to be reasonably contemplated for the tower's location.[7] Breach of a warranty created by statements describing the specific capacity of goods is proved when the product is shown by direct or circumstantial evidence to have failed to perform reasonably and safely the function for which it was intended by the manufacturer. Drier v. Perfection, Inc., supra, 259 N.W.2d at 504; see also Swenson v. Chevron Chemical Co., ___ S.D. ___, 234 N.W.2d 38, 42-43 (1975); S-C Industries v. American Hydroponics System, Inc., 468 F.2d 852, 855 (5th Cir. 1972). In view of the affirmation made in the catalog, there was sufficient evidence for the jury to reasonably find that the tower was not as durable as it was warranted to be.[8]

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[7]The trial judge surmised that the jury did not believe that ice and snow were a contributing factor in the collapse. The findings of the jury, however, are inherent in its verdict, and a court's inquiry must simply be whether there exists substantial evidence to sustain the verdict.

[8]Proof of a specific defect was not essential to Community's recovery on the breach of express warranty count. Drier v. Perfection, Inc., supra 259 N.W.2d at 504.

Viewing the evidence in the light most favorable to Community, and assuming all conflicts in the evidence were resolved by the jury in Community's favor, Griggs v. Firestone Tire & Rubber Co., 513 F.2d 851, 857 (8th Cir.), cert. denied, 423 U.S. 865 (1975); Heiser v. Rodway, ___ S.D. ___, 247 N.W.2d 65, 68-69 (1976), we conclude that there is sufficient evidence to support the jury's finding of breach of express warranty.

Contractual Limitation of Liability.

On the back of each page of the two-page sale contract is a printed form entitled "Terms and Conditions of Sale," which includes a warranty and limitation of liability clause, hereafter referred to as item nine. Dresser contends that this clause precludes it from incurring any liability for breach, or alternatively, limits its liability to the purchase price of the tower -- $385,000 less depreciation.[9]

In item nine, Dresser warrants that its product will be free of defects in material and workmanship and will meet applicable specifications. The warranty is limited to those defects for which the buyer submits a written claim immediately upon discovery, and in any event, within six months from final acceptance. The buyer's remedies for breach of the warranty are limited to repair, replacement, or

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[9]Community actually recovered $950,295.24 for replacement cost less depreciation of the tower and $324,339.36 for replacement cost less depreciation of the antenna and adjacent buildings, for a total judgment of $1,274,631.60. The standard measure of damages, difference in value as accepted and as warranted, S.D. Compiled Laws Ann. § 57-8-36, was not used. Dresser does not challenge the manner of calculating damages.

refund of an equitable portion of the purchase price of any product Dresser determines to be defective or finds failed to meet applicable specifications. Dresser has the sole option of deciding which remedy it will provide. Item nine states that this limited warranty is in lieu of all other warranties, and the purchase price is based on the limitation of Dresser's liability and the buyer's waiver of any claim for damages.[10]

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[10]Item 9 provides in part:

> 9. WARRANTY AND LIMITATION OF LIABILITY: Seller warrants, for a period of six months, that products of its own manufacture and any construction performed hereunder by the Seller shall meet the applicable specifications incorporated in this contract, and be free from defects in material and workmanship. Provided Buyer submits a claim in writing to Seller immediately upon its discovery and in any event within six (6) months after shipment if no construction is performed hereunder or within six (6) months after final acceptance by Buyer if construction is performed (or within six months from notification of completion by Seller if Buyer wrongfully refuses or delays final acceptance), Seller shall, at Seller's sole option, repair, replace or refund an equitable portion of the purchase price of any product or work which Seller determines to have been defective or failed to meet applicable specifications. . . .
>
> Except for obligations expressly and specifically assumed under the other clauses of these Sales Terms, the foregoing is Seller's only warranty, obligation, and liability, under tort (including alleged negligence) contract or otherwise for or in connection with its products, work and services or use thereof. THE FOREGOING IS EXPRESSLY IN LIEU OF ALL OTHER WARRANTIES WHATSOEVER, EXPRESS, IMPLIED AND STATUTORY, INCLUDING WITHOUT LIMITATION, THE IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS. IT IS SPECIFICALLY UNDERSTOOD SELLER'S PRICE IS BASED UPON THE FOREGOING LIMITATION OF LIABILITY AND BUYER'S WAIVER OF ANY AND ALL CLAIMS FOR DAMAGES.

The trial court refused to enforce the limitations of Dresser's liability set forth in item nine. Judge Nichol specifically held that the six month period was a "manifestly unreasonable" time for discovery and notification of breach under Section 57-1-14 of the South Dakota Commercial Code, in light of the tower's twenty-five year average useful life.[11] Dresser argues that under the South Dakota Commercial Code, a seller's warranty does not extend to future performance absent explicit agreement to the contrary. See generally, Binkley Co. v. Teledyne Mid-America Corp., 460 F.2d 276 (8th Cir. 1972). Dresser also contends that the six month discovery period is a reasonable commercial agreement on when to transfer risk to the buyer, based on inspection and maintenance obligations. In the alternative, if six months is an unreasonably short period of time to transfer risk, Dresser argues that five years -- the time lapse from erection of the tower to notice of collapse -- is an unreasonably long period, and the trial court should have set a reasonable time.[12] In addition, Dresser urges that the limitation of remedy provision in item nine provided the buyer with a reasonable and adequate remedy, which contrary to the trial court's finding, did not fail of its "essential purpose." South Dakota Compiled Laws Ann. § 57-8-50; U.C.C.

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[11]Section 57-1-14, which is identical to U.C.C. § 1-204(1), provides in part:

> Whenever this title requires any action to be taken within a reasonable time, any time which is not manifestly unreasonable may be fixed by agreement. What is a reasonable time for taking any action depends on the nature, purpose and circumstances of such action.

[12]We note the defense of the statute of limitations was not raised in the pleadings and is not argued on appeal as such.

§ 2-719(2). Dresser contends that the trial court's holding, particularly as it affects the limited remedy agreed upon by Community and Dresser, will create serious problems in enforcement of commercial agreements between parties with relatively equal bargaining power.

We conclude that it is not necessary to review the trial court's holding that the contractual clauses limiting liability and remedy were invalid. We find that the limitation clauses apply only to the limited and purportedly exclusive warranty set forth in item nine, and not to the broader warranty created by the affirmation made in Dresser's advertising materials.

The six month notification period relates to the warranty that Dresser's products and construction "shall meet the applicable specifications incorporated in this contract, and be free from defects in material and workmanship." Similarly, the limitation of remedy provision applies to "any product or work which seller determines to have been defective or failed to meet applicable specifications." In attempting to assert the clauses within item nine as a defense, Dresser overlooks the fact that the jury found Dresser was not liable on the negligence and strict liability counts. Thus, the jury did not find that Dresser's product or construction was defective in materials or workmanship or failed to meet the applicable specifications. See McIntyre v. Everest & Jennings, Inc., 575 F.2d 155, 159 (8th Cir. 1978). Indeed, if the advertising materials were omitted from the bargain, we would be constrained to agree with Dresser that the undisputed evidence showed that the technical 60 psf wind loading design specification was met.

However, Dresser's affirmation in its advertising

catalog went beyond the limited warranty in the written contract and created a promise concerning the tower's durability much broader than mere compliance with the 60 psf specification. Dresser promised Community that a nondefective, properly designed tower would "safely withstand the maximum wind velocity and ice storms to which [it is] likely to be subjected." This broad warranty of performance clearly falls outside the limited warranty provided in item nine. Cf. S-C Industries v. American Hydroponics System, Inc., supra, 468 F.2d at 855; Fargo Mach. & Tool Co. v. Kearney & Trecker Corp., supra, 428 F. Supp. at 371. Thus, the jury could reasonably have found that the tower was not defective in materials or workmanship and met the technical specifications, but did not live up to its promised performance capacity.

Item nine does not limit the duration of the express warranty of durability or performance evident from the overall agreement of the parties as evidenced by the catalog, nor limit remedy for its breach. S-C Industries v. American Hydroponics System, Inc., supra, 468 F.2d at 855. Nor does the general disclaimer of all warranties other than the limited one set forth in item nine restrict Community's right to recover. Under Section 57-4-34 of the South Dakota Commercial Code,[13] language which limits or negates an

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[13] S.D. Compiled Laws Ann. § 57-4-34, U.C.C. § 2-316(1), provides:

> Construction of words or conduct tending to negate or limit express warranty inoperative. Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent with each other; but subject to the provisions of chapter 57-3 on parol or extrinsic evidence (§ 57-3-4) negation or limitation is inoperative to the extent that such construction is unreasonable.

express warranty is inoperative when it cannot reasonably be construed consistently with language which creates the warranty. If the limited warranty were exclusive, it would limit the wind loading specification to its technical content and negate the express warranty of durability or performance. In S-C Industries v. American Hydroponics System, Inc., supra, a seller argued that a printed special warranty against defects similar to the one in question here, which stated that it superseded all other warranties, precluded recovery for breach of a specific express warranty created by technical loading specifications. The court stated:

> The general language of that special warranty does not mention the written express warranty which [seller] had given [buyer]. The only reasonable interpretation that can be placed on this special warranty in light of the prior specific warranty, is that it applies only to any defects which might be found to exist in the various components and other materials which [seller] sold. Thus, while the special warranty form provided the exclusive remedy should any component be defective, it did not supersede the specific express warranty which extended to the design capability of nondefective structural members intended to perform as an integral part of the greenhouse building.

468 F.2d at 855.

We conclude that there is sufficient evidence to support the finding that Dresser breached its warranty that the tower, when free from defects in materials and workmanship and properly designed for its location, would withstand the wind and ice loads to which it would normally be subjected. The terms and conditions of sale in the written contract do not apply to the warranty, and therefore cannot limit Dresser's liability for its breach.

Accordingly, the judgment is affirmed.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B

United States Court of Appeals.

FOR THE EIGHTH CIRCUIT

No. 77-1750

RECEIVED
NOV 27 1978
ROBERT W. PATTERSON

Community Television Services, Inc., a corporation,

Appellee,

v.

Dresser Industries, Inc., a corporation,

Appellant.

Appeal from the United States District Court for the District of South Dakota

Filed: November 24, 1978

ORDER DENYING REHEARING EN BANC

The petition for rehearing en banc is denied. Judges Lay, Heaney, Stephenson, Henley, and McMillian vote to deny the petition. Judges Gibson, Bright, and Ross vote to grant the petition.

GIBSON, Chief Judge. (Judge Bright and Judge Ross join in the following dissent.)

I respectfully dissent from the denial of a rehearing en banc. Upon greater reflection it appears that the panel opinion contains two areas of difficulty. First, it finds liability based on supposed warranties contained in a catalog distributed years before the parties contracted for construction of this tower. Second, it refuses to enforce contractual

clauses limiting Dresser's liability to the repair or replacement of the tower, or refund of the purchase price.

In my view, the evidence was sufficient to uphold the jury verdict of liability based on breach of the express warranty contained in the written contract. Since I believe the evidence supported a finding of liability on at least one theory, it would be counterproductive to rehear the question of liability.

Failure to enforce the clause limiting Dresser's liability, however, presents a serious question of injustice. The parties are two substantial commercial corporate entities, experienced in the technical world of broadcasting. They had dealt with one another before and were aware of the risk that broadcast towers entail and that towers sometimes fall. They also knew that construction costs of towers had been rising from year to year. Despite these facts, the parties entered into an agreement expressly providing that in the event of breach of warranty Dresser would, at Dresser's "sole option, repair, replace or refund an equitable portion of the purchase price of any product or work which seller determines to have been defective or failed to meet applicable specifications * * * ."

I cannot imagine any clearer agreement of the parties to limit the extent of liability. Nor can I say that the remedy fails its "essential purpose" or is "unconscionable."[1] To suppose that the limitation on remedy contained in the contract was intended to apply only to the warranties contained in the written agreement but not to those in the catalog, is

[1] The requirement that the buyer give notice of any defect within six months of completion stands on a different footing. If applied here it would result in the warranties and remedies failing their essential purposes and would be unconscionable.

to build a fantasy on top of a fiction.[2] Under U.C.C. § 2-719(1), S.D. Compiled Laws § 57-8-49, the parties are entitled to limit remedies. To further certainty in commercial relationships and justice between these parties, we ought to enforce the contract as written.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

[2]The panel opinion finds the catalog representations to be part of the "bargain." However, it refuses to acknowledge that in that case they become the "specifications" for the work. They are being applied by this court. In short, the catalog representations became the "applicable specifications" referred to in the written contract. Contra slip op. at 12.

APPENDIX C

Memorandum Decision

Civ 75-4056

Messrs. Ellsworth E. Evans and Deming Smith, of Davenport, Evans, Hurwitz & Smith, of Sioux Falls, South Dakota, appeared in behalf of the plaintiff;

and

Mr. Harold C. Doyle, of May, Johnson & Burke, of Sioux Falls, South Dakota, and Mr. G. Alan Cunningham, of Faegre & Benson, of Minneapolis, Minnesota, appeared in behalf of the defendant.

This is an action by a purchaser against a seller arising out of the collapse of a television and radio broadcasting tower. The case was tried to a jury, commencing on November 29, 1976, with the verdict rendered on December 17, 1976. The jury found in favor of plaintiff, and assessed damages in the amount of $1,385,001.61. This matter is now before the court on post-trial motions filed by defendant.

Defendant has submitted two motions, in the alterna-

tive. Initially, this court is requested to vacate the judgment for plaintiff and enter a judgment notwithstanding the verdict, finding for defendant. Alternatively, defendant requests a new trial on Count III of the complaint.

This case arose after plaintiff's 2000 foot[1] television and radio broadcasting tower collapsed during a blizzard, in the early hours of January 11, 1975. The tower, along with the antennas and cables attached to it, was totally destroyed. In addition, one building beneath the tower was demolished, and another was partially damaged.

The tower which collapsed had been purchased by plaintiff from defendant, which designed, manufactured, and erected it.[2] The specifications incorporated in the contract for sale disclosed that "The tower shall be designed to resist a uniform wind load per drawing T-5172, sheet S-1, 60 psf on flats." As the testimony and evidence presented at trial demonstrated, this specification contemplated the construction of a guyed tower which would withstand a force of 60 pounds per square foot on flat surfaces. Defendant's advertising brochure stated that the wind velocity necessary to create this amount of pressure would be approximately 120 miles per hour, absent any other factors.[3] This court found as a matter of law that this specification created an express warranty.

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[1]The overall height of the tower and its appendages was 1,984 feet, but it was referred to throughout the trial as a "2000 foot" tower.

[2]The erection of the tower was performed by Allied Construction, which was retained by defendant for that purpose.

[3]The evidence and testimony in this case demonstrated that the presence of ice and snow, separately and in combination, on the tower would increase the size of the tower members exposed to the wind, and would therefore decrease the velocity of wind necessary to create the 60 pounds per square foot pressure. This fact was argued extensively to the jury by defendant. The jury apparently found that the presence of ice and snow on the tower at the time of collapse, if any, had been insufficient in amount to be a causal factor in the collapse.

Plaintiff proceeded on various theories of liability. The jury was ultimately instructed on negligence, strict liability in tort, and breach of express warranty. The jury's answers to the special interrogatories submitted to them by the court show that they based defendant's liability on a breach of the express warranty.

Defendant's first attack on the verdict addresses issues determined by this court as a matter of law during the course of the trial. Specifically, defendant takes issue with this court's findings that the six month warranty limitation was manifestly unreasonable, and that the remedies provided by the contract failed of their essential purpose. This court has carefully reconsidered these issues in light of the record and the briefs submitted by the parties, and is not persuaded to change its prior rulings.

Defendant's second argument focuses on the answers by the jury to the special interrogatories submitted by the court. Defendant alleges that the jury's answers are in irreconcilable conflict, and that for this reason the verdict should be set aside and a new trial granted. The court finds that this argument is not well founded.

Defendant contends that by finding no liability on the basis of negligence, and no liability on the basis of strict liability in tort, the jury was logically prevented from finding liability based on a breach of the express warranty. Defendant asserts that a findings of a "defect" is inherently involved under each of these theories, and that the jury could not find the tower "defective" for one theory and not for the others. Defendant argues that this alleged inconsistency necessitates a new trial.

This court has a duty to attempt to reconcile the special interrogatories with the general verdict, if possible, to

avoid invading the province of the jury. Wright & Miller, Federal Practice and Procedure, section 2513 (1971); *cf.* Gallick v. Baltimore & Ohio R. Co., 372 U.S. 108, 119 (1963). The court has carefully reexamined the record in this case, and concludes that the answers to the special interrogatories are not inconsistent with themselves or with the general verdict upon the facts in the record.

While it may be true that each of the theories considered by the jury contemplates the finding of a "defect" in some sense, defendant's argument glosses over the other distinctive elements which each theory contains. Negligence requires a finding of a failure to adhere to a standard of care required by law. Strict liability in tort, as explained by section 402A of the Restatement of the Law, Torts, Second, requires a finding that the defect in the product rendered it unreasonably dangerous to the user or his property. *See* Engberg v. Ford Motor Co., 205 N.W. 2d 104 (S.D. 1973). As the comments to section 402A point out, even if a product is defective in some manner, that defect must render the product "unreasonably" dangerous. A product can be dangerous without being unreasonably dangerous. *See* Restatement of the Law, Torts, Second, section 402A, comment k.

An examination of the record convinces this court that the jury's finding is supported by the evidence, and that failure to find liability on the theories of negligence and strict liability in tort is not inconsistent with the particular facts in this case. A new trial is not mandated on this basis.

Defendant's final contention is that the jury did not properly determine the amount of damages to be awarded plaintiff, and that a new trial should be had on this issue. The court finds this contention meritorious.

The jury instruction relating to the measure of damages read:

> Now, plaintiff's damages may be ascertained by determining the cost of constructing a similar tower, replacing the antenna, repairing the damaged buildings, and deducting therefrom the depreciation suffered by reason of age and use, unless such cost is greater than the difference between the before and after value of the tower, antenna and buildings damaged, in which case the difference in market value before and after the collapse would be the proper measure of damages.

Under this instruction the jury was to award the lesser of diminution in market value or cost of replacement less depreciation, unless they found the two amounts to be equal. Plaintiff asserted throughout the trial that the amount of loss suffered by reason of the collapse of the tower could only be measured by the replacement cost less depreciation, owing to the special circumstances present in this case.

The South Dakota Supreme Court has recognized replacement cost minus depreciation as a proper measure of damages. Shaffer v. Honeywell, Inc., 249 N.W. 2d 251, 258 (S.D. 1976); *see also* Big Rock Mountain Corp. v. Stearns-Roger Corp., 388 F.2d 165 (8th Cir. 1968). South Dakota has also codified the measure of damages recoverable for a breach of warranty.

> The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the val-

> ue they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount.

SDCL 57-8-37 (1967). In addition, consequential damages are recoverable in this case, under this court's previously announced rulings. SDCL 57-8-40 (1967). The question in this case is what method of measuring damages should have been applied.

As the Eighth Circuit Court of Appeals noted in *Big Rock Mountain:*

> Where there is more than one method of estimating damages, that method which is most definite and certain should be adopted. No one method is exclusive where several exist, but that one should be chosen which best achieves the fundamental purpose of compensation to the injured person for his loss; and, if the facts show that either of two measures of damages will fully compensate plaintiff for his loss, that measure must be adopted which is less expensive to defendant.

388 F.2d 165, 170 (8th Cir. 1968) (quoting 25 C.J.S. Damages section 72 (1966)).

This court has carefully examined the record in this case in light of the general admonition that an injured party should be fully compensated for losses suffered through the fault of another, but that he should not be allowed a windfall. From this examination it is concluded that under the specific circumstances of this case plaintiff will be fully compensated for the injuries suffered only by measuring the cost of replacing and repairing the damaged

and destroyed structures and equipment, and subtracting therefrom a reasonable depreciation for the use plaintiff had enjoyed prior to the damage. Metropolitan Life Ins. Co. v. Farmers Co-operative Co., 2 N.W. 2d 665 (S.D. 1942); Shaffer v. Honeywell, Inc., 249 N.W. 2d 251 (S.D. 1976).

The jury assessed plaintiff's damages in the amount of $1,385,001.61. Although the jury was apparently attempting to calculate the amount of damage suffered by plaintiff through use of the replacement cost less depreciation approach, the amount ultimately awarded is not justified by the evidence. Viewing the evidence in the light most favorable to the plaintiff, the largest recovery justified by the evidence under the court's instructions was $1,274,631.60.[4] In light of this, the court finds the verdict excessive as a matter of law. The excessiveness of the verdict, however, is not so shocking as to indicate that it was the result of passion and prejudice on the part of the jury. This court is of the opinion that an unconditional new trial on the issue of damages is not warranted.

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[4]This figure is arrived at through the use of plaintiff's exhibits 100 and 101. The replacement cost for the tower was $1,099,880.95. From this figure was subtracted $20,000.00, which represented the amount of betterment over the tower replaced due to some differences in the construction. From the remainder of $1,079,880.95 was subtracted $129,585.71, which represented depreciation of six years over a useful life of 50 years.

The replacement cost for the antenna was $343,338.93. From this was subtracted $8,000.00 for overstock returned to the manufacturer. From the remainder of $335,338.93, this court subtracted $50,300.86, which represents six years depreciation over a useful life of 40 years.

The repair and replacement costs on the buildings totalled $45,699.17. From this figure was subtracted $6,397.88, which represented seven years depreciation over a useful life of 50 years.

The total net depreciation replacement value arrived at in this manner for the tower, antenna, and buildings was $1,274,631.60.

It is well settled that a trial court may condition the denial of a motion for new trial in circumstances such as these on a remittitur by plaintiff. *See generally* Wright & Miller, Federal Practice and Procedure, section 2815 (1973), and cases cited therein. It is this court's opinion that in this case the only result which would be consistent with the Seventh Amendment would be to require plaintiff to remit the excess of the verdict over the maximum which the jury could have awarded under the evidence and instructions as a condition of the denial of defendant's motion for a new trial on the issue of damages. Wright & Miller, Federal Practice and Procedure, section 2815 (1973); *see also* Rice v. Union Pacific R. Co., 82 F. Supp. 1002 (D. Neb. 1949).

This court will, therefore, deny defendant's motion to vacate the judgment and to enter a judgment notwithstanding the verdict. Further, this court having determined that the verdict was excessive to the extent of $110,370.01, it will be ordered (1) that, if and upon the condition that, within thirty days of the entry of this memorandum decision, plaintiff, by one of its attorneys of record, shall serve upon opposing counsel and file in this case a remittitur of the sum of $110,370.01 upon the verdict found and returned herein and a release, to that extent only, of the judgment entered upon the verdict, the motion for a new trial be denied and the judgment confirmed for the remaining sum; but (2) that if such remittitur and release be not so served and filed within thirty days of the entry of this memorandum decision, the motion for a new trial be sustained, the judgment entered upon the verdict be vacated and cancelled, the verdict be set aside as to the issue of damages, and a new trial be granted in the case solely on the issue of damages.

Done and entered at Sioux Falls, South Dakota, this 27th day of July, 1977.

BY THE COURT:

/s/ FRED J. NICHOL
Chief Judge

Order Denying Defendant's Motion for Judgment Notwithstanding the Verdict and Denying New Trial on Condition of Remittitur of Damages

Civ. 75-4056

This cause came on to be heard on motion of the Defendant for judgment notwithstanding the verdict, or in the alternative for a new trial on Count III of the Complaint, and the Court having heard the argument of counsel and being fully advised, it is

ORDERED that Defendant's motion for judgment notwithstanding the verdict is denied.

The Court having determined that the verdict was excessive in the sum of $110,370.01,

IT IS FURTHER ORDERED (1) that if and upon condition that, on or before August 26, 1977, the Plaintiff, by one of its attorneys of record, shall serve upon opposing counsel and file in this case a remittitur of the sum of $110,370.01 upon the verdict found and returned herein, and a release, to that extent only, of the judgment entered upon the verdict, the motion for a new trial be, and the same hereby is, denied, and the judgment confirmed for the remaining sum, that is, $1,274,631.60; but (2) that if such remittitur and release be not so served and

filed on or before August 26, 1977, the motion for a new trial be sustained, the judgment entered upon the verdict be vacated and cancelled, the verdict be set aside as to the issue of damages, and a new trial be granted in the case solely on the issue of damages.

Dated this 8th day of August, 1977.

BY THE COURT:

FRED J. NICHOL
Chief Judge

ATTEST:
WILLIAM J. SRSTKA
Clerk
(Seal of Court)
By Nancy A. Nicolai
Deputy